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BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED PARCEL SERVICE, INC. Respondent, and ROBERT C. ATKINSON, JR., Charging Party.	Case No 06-CA-143062 **CHARGING PARTY'S REPLY TO RESPONDENT'S ANSWERING BRIEF**

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I. INTRODUCTION

Most of the arguments in Respondent's Answer to the Charging Party's Exceptions have been effectively rebutted in prior briefing. However, the Charging Party wishes to address a few aspects of Respondent's Answer.

First, the two and a half year delay in scheduling arbitration on the June 20, 2104 discharge precludes deferral of both it and the October 28, 2014 discharge. The General Counsel need not prove who is to blame for the delay. That delay precludes deferral on both discharges because there is substantial factual and legal overlap between them.

Second, conflict of interest alone can preclude deferral.

Finally, the Respondent wrongly claims that allegations of pre- and post-discharge misconduct are subject to the same standard and misapplies the law to Atkinson's Facebook posting.

II. DEFERRAL IS INAPPROPRIATE

A. The two-and-a-half year delay in scheduling arbitration precludes deferral on both terminations.

The Charging Party argued in his Exceptions that the Board should defer neither his June 20, 2014 nor his October 28, 2014 discharge to arbitration because arbitration for the former had not even been scheduled after two and a half years. Charging Party's Brief in Support of Exceptions, p. 9-10.

The Respondent argues that the General Counsel has not proven UPS is to blame for the delay. Respondent Answer to Charging Party's Exceptions, p. 11-12. It is hard to imagine how any party making even a half-hearted effort to arbitrate a grievance could fail to achieve a

hearing date after two and a half years. That said, it does not matter whether Respondent is to blame or not.

The Board requires as a condition of deferral that arbitration resolve a ULP with "reasonable promptness" without regard to whose fault any delay is. *Collyer Insulated Wire*, 192 NLRB 837, 843 (1971); General Counsel Memorandum 12-01, p. 8-9; *see also Babcock & Wilcox*, 361 NLRB No. 132, 13 FN 36. The purpose of revoking deferral when a delay becomes apparent is not to punish anyone. It is to ensure that the Board can do its job – to ensure that the ULP is handled expeditiously, that evidence is preserved, and that remedies are effective. GC Memorandum 12-01, p. 8. Therefore the General Counsel need not prove UPS is to blame for the delay.

Later, Respondent argues that it would be appropriate to defer one of the two discharges and proceed to hearing on the other. Respondent Answer to Charging Party's Exceptions, p. 15-17. It urges a very narrow reading of the doctrine that if two allegations are related and deferral of one is inappropriate, the Board will proceed to hearing on both. *Id.*

Neither of the cases cited by Respondent states or implies that close temporal proximity is necessary to the doctrine. *Avernimeritor*, 340 NLRB 1035, 1035 FN 1 (2003); *Hoffman Air & Filtration System*, 312 NLRB 349, 352 (1993). Thus, in *Hoffman Air & Filtration* the Board held it was appropriate to separate and defer unilateral change and subcontracting issues from actions taken against a steward because the former were "not in any way factually or legally interrelated with the issues presented by the alleged threat or alleged discriminatory discipline." 312 NLRB at 353. However, allegations of a threat and a retaliatory discipline against the same

person were not separable.[1] 312 NLRB at 352. "If the Board must hear and resolve one issue, it makes no economic sense to refrain from deciding a closely related issue. In addition, it would not be prudent to require litigation of related issues in more than one forum." *Id.*

Charges can be separated in time and nonetheless be closely related, factually or legally. For example, in *American Commercial Lines*, the Board considered a series of ULP charges including events that spanned about six months. 291 NLRB 1066, 1067, 1087 (1988). They ranged from intimidating employees by throwing a contract in the trash, to terminating employees, to refusing to bargain. 291 NLRB at 1067, 1069. The Board found them to be "inextricably related" for deferral purposes. "The discharges here at issue are an integral part of the Respondent's overall pattern of unfair labor practices and are so closely intertwined with the other complaint allegations involved in this case that we find deferral would result in disorderly proceedings and confusion." 291 NLRB at 1069.

It is obvious from reading the ALJ's decision – as well as Respondent's briefing – that the June 20 and October 28 discharges involve extensive factual and legal overlap. For example, the Respondent argues defenses that Atkinson's "Vote No" activity was unprotected and that UPS had no idea despite its extensive monitoring of the activity that Atkinson was a leader. Respondent's Brief in Support of Exceptions, p. 23-31. Those arguments are relevant to both discharges. Similarly, the ALJ found much of the evidence of animus underlying the June 20 discharge also demonstrated the employer's animus with respect to the October 28 discharge, including: McCready's confrontation with Atkinson about the signs; Lojas's statement the Vote

[1] Contrary to what Respondent appears to argue, these were not an 8(a)(1) and 8(a)(3) allegation based on the same act, but two acts against the same person – the 8(a)(3) was based on a warning against a steward and the 8(a)(1) on a statement during an interview leading up to the warning that he should be setting an example for other employees because he was a steward. 312 NLRB at 351.

No signs put Atkinson on the radar; Alakson's friendly but ominous warnings; and Blystone's report to Atkinson and Kerr that Bartlett, DeCecco and Alakson were singling out Atkinson to get rid of him for being a troublemaker and orchestrating the Vote No signs. ALJ Decision, p. 53-54. Thus, deferring only the June 20 discharge would result in exactly the sort of confusing and inefficient duplicative litigation that *Hoffman Air & Filtration* seeks to avoid.

B. Conflict of interest precludes a fair and regular hearing.

The Charging Party argued in his Exceptions that the Joint Panel proceedings for his October 28 discharge were not "fair and regular" because he was represented by a political opponent who tried to get him fired in front of a panel of negotiators whose contract he had helped defeat. Charging Party's Brief in Support of Exceptions, p. 10-15.

The Charging Party is puzzled by the Respondent's claim that the panelists had "no knowledge of the dispute" and that panelist Gandee in particular was not deeply involved in monitoring Atkinson's Vote No activity – the documentary evidence of the monitoring is extensive. *Compare* Respondent's Answer to Charging Party's Exceptions, p. 13-14, 15 *with* Charging Party's Brief in Support of Exceptions, p. 18-19 *citing* Tr. 1:189, 4:663, 838, 5:976, CPX 1; CPX 2; CPX 4, p. 45-46, 47-49, 81-82; CPX 5, p. 46, 48; RX 1, p. 1, 5, 6, 7, 11.

Respondent argued Gandee was an appropriate decision maker citing an ALJ decision in *Mercy Hospital.* Respondent's Answer to Charging Party's Exceptions, p. 15 *citing Mercy Hospital*, 18-CA-155443 (ALJ Carter, 5/6/16). However, that decision concerned the question of whether the employer's conduct overall demonstrated such animosity to protected rights as to render all arbitration futile, not the bias of the individual who would hear the case. *Mercy Hospital*, 18-CA-155443 at p. 21-22.

The Respondent claims that conflict of interest alone cannot preclude a fair and regular hearing; specific acts of misconduct by the union during the hearing are necessary. Respondent's Answer to Charging Party, p. 12-14. This misstates the law.

In most of the cases relied upon by the Charging Party in his Exceptions, there was no indication of any act of misconduct by the union during the hearing – indeed many refused deferral before a hearing even occurred. *United Technologies Corp.* 268 NLRB 557, 560 (1984)(no pre-arbitral deferral "where interests of the union which might be expected to represent the employee filing the unfair labor practice charge are adverse to those of the employee"); *American Medical Response of Connecticut, Inc.*, 359 NLRB No. 144, p. 1 FN 2, p. 7 FN 2 (2013) ("apparent conflict of interests" due to political conflict, no mention of conduct during grievance process), *vacated under Noel Canning and reconfirmed*, 361 NLRB No. 53 (2014), *enf'd NLRB v. American Medical Response of Connecticut, Inc.*, 627 Fed. Appx. 40 (2nd Cir. 2016); *NLRB v. Iron Workers Union, Local 433*, 767 F.2d 1438, 1438-39, 1442-43 (9th Cir. 1985)(upholding pre-arbitral deferral based on parties' interests rather than conduct during grievance process); *United Parcel Service*, 228 NLRB 1060, 1060, 1061 (1977)(refusing post-panel deferral based on parties' interests; no indication of wrongdoing during grievance process).

In *Herman Brothers*, discussed by Respondent, the conduct of the union during the hearing played no role in the Board's or court's decision. Thus, the Third Circuit stated its reasoning as follows:

> The arbitration panel consisted only of union and management representatives, both of whose interests appeared to be aligned against Stief. Normally, the Union's representatives would adequately represent Stief's interest. Here, however, Stief actively opposed adoption of the proposed collective bargaining agreement which was supported by the Union as well as the Company. Stief had had several disagreements with the Union leadership [FN describing disputes over mail ballot and demand for official's resignation] which further aggravated the relationship between Stief and the Union.

Herman Brothers, Inc. v. NLRB, 658 F.2d 201, 207 (3rd Cir. 1981). The Board's analysis was based on the same factors, not on facts about what occurred during any hearing. *Herman Brothers, Inc.*, 252 NLRB 848, 848 (1980).

Thus, misconduct by a union during a hearing is sufficient but not necessary to preclude deferral. The Board's focus is on the conflicting interests and history between the charging party and those entrusted with pursuing and deciding his or her grievance.

In addition, Respondent makes an apparent waiver argument. The Respondent does not provide facts from which a waiver could be inferred – only testimony that it has a general practice of asking grievants before their fate is decided whether they have put in all the evidence they had. Respondent's Answer to Charging Party, p. 14 *citing* Tr. 5:980-82.

However, even if the evidence did rise to the level of a knowing and voluntary waiver by Atkinson, such a waiver could not bind the General Counsel, who acts in the public interest. *Roadway Express*, 355 NLRB at 201. In *Roadway Express*, the Board considered a deferral argument based on questions similar to those UPS asks grievants; the charging party answered in the affirmative when asked if the union represented him fully and fairly. 355 NLRB at 199. The Eleventh Circuit had already held this answer to be a binding waiver on the charging party. *Id.* at 199.

Nonetheless, the charging party's waiver did not require deferral or preclude the General Counsel from pursuing a DFR claim. *Id.* at 201. Allowing the Charging Party to bind the General Counsel would

> fail[] to recognize the statutory function of the General Counsel, who is vested under Section 3(d) of the Act with exclusive prosecutorial authority on behalf of the Board. The General Counsel is not simply representing [the charging party's] private interest in obtaining compensation. Rather, as the Supreme Court has explained, "the Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the

> instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce."

Roadway Express, 355 NLRB at 201 *quoting Amalgamated Utility Workers v. Consolidated Edison Co. of New York*, 3009 U.S. 261, 265 (1940).

III. THE RESPONDENT CANNOT AVOID REINSTATEMENT.

Finally, the Respondent asks the Board to disregard well-established precedent that preserves the remedy of reinstatement in all but the most severe of post-discharge misconduct cases.

First, the Respondent claims there is no difference between the standard an employer must meet to avoid reinstatement based on allegations pre-discharge misconduct as opposed to post-discharge misconduct. Respondent Answer to Charging Party's Exceptions, p. 5-6. This is wrong.

For pre-discharge misconduct, the Board determines whether "the discriminate engaged in unprotected conduct for which the employer would have discharged any employee." *See, e.g., Tel Data Corp*, 315 NLRB 364, 367 (1994), *revised in part on other grounds*, 90 F.3d 1195 (6th Cir. 1996). This is the pre-discharge standard the ALJ incorrectly applied to Atkinson's post-discharge Facebook posting.[2]

The correct standard for allegations of post-discharge misconduct is whether the conduct was "so flagrant as to render the employee unfit for further service or a threat to efficiency in the plant." *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, 406 (1969); Charging Party's Brief in

[2] UPS states that "some" of the cases cited by the ALJ concerned pre-discharge misconduct, but as explained in the Charging Party's Exceptions all of them did. *Compare* Respondent's Answer to Charging Party's Exceptions, p. 6 *with* Charging Party's Brief in Support of Exceptions, p. 5-6.

Support of Exceptions, p. 5-6. This is a much higher burden than conduct for which the employer "would have discharged any employee."

The Respondent's arguments rely heavily on the pre-discharge standard. For example, UPS argues at length about the reasons for its Equal Employment Opportunity Policy and Professional Conduct and Anti-Harassment Policy and its claim that Atkinson violated them. Respondent Answer to Charging Party's Exceptions, p. 5-9. Yet Atkinson simply was not bound by the Employer's policies after he was fired.

The Board has for nearly fifty years intentionally set a very high bar for employers to avoid remedies for proven violations of the Act. *Hawaii Tribune-Herald*, 356 NLRB 661, 662 (2011); *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976), *enforced*, 548 F.2d 391 (1st Cir. 1977); *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, 406 (1969).

Threats of bodily harm, assault, and blackmail meet that standard. Charging Party's Brief in Support of Exceptions, p. 6-8 *discussing Fund for Public Interest*, 360 NLRB 877, 877 (2014); *Connecticut Humane Society*, 358 NLRB 187, 216 (2012); *Hadco Aluminum & Metal Corp.*, 331 NLRB 518, 521 (2000); *Alto-Shaam, Inc.*, 307 NLRB 1466, 1467 (1992); *Family Nursing Home*, 295 NLB 923, 923 (1989); *Roure Bertrand Dupont*, 271 NLRB 443, 444-445 (1984); *Fairview Nursing Home*, 202 NLRB 318, 322 fn. 36 at 325 (1973).

Racial slurs, calling a supervisor a "stupid f-cking bi-ch" in front of customers, and accusing an employer of feeding children spoiled food do not. Charging Party's Brief in Support of Exceptions, p. 6-8 *discussing examples collected in Connecticut Humane Society*, 358 NLRB at 216 *and Fund for Public Interest*, 360 NLRB at 877. The statements made by Atkinson, while he regrets them, are far milder than those that have been held *not* to preclude reinstatement. Nor

is there any basis for the Respondent's insinuation that Atkinson's posting might lead to "hate-motivated workplace massacres." Respondent Reply to Charging Party's Exceptions, p. 6.

The reason for this high bar is obviously not that the Board approves of racial slurs, language that degrades women, or slander. Rather, it is that "Employers who break the law should not be permitted to escape fully remedying the effects of their unlawful actions based on the victims' natural human reaction to the unlawful acts." *Hawaii Tribune-Herald*, 356 NLRB at 662 *quoting Trustees of Boston University*, 224 NLRB at 1409.

The question before the Board is not whether Atkinson's statements were offensive. Offensive post-discharge statements do not preclude reinstatement. Only much more extreme conduct, such as threats, violence and criminal activity, cause the Board to forego its mandate to remedy proven violations of the Act.

IV. CONLUSION

For the reasons set out above and in his prior briefing, the Charging Party requests that the Board adopt the ALJ's findings that deferral is inappropriate and the Employer violated the Act by terminating the Charging Party. The Charging Party also respectfully requests that the Board order reinstatement in addition to the remedies ordered by the ALJ and modify the Notice as previously requested.

DATED this 10th Day of March, 2017

Respectfully submitted,

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